NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE
DIVISION IV

CA 06-1314

JUNE 6, 2007

NATHAN EUGENE KINGREY
APPELLANT

V.

GINA LYNN PERDUE MASSEY
APPELLEE

APPEAL FROM THE UNION COUNTY CIRCUIT COURT, THIRTEENTH JUDICIAL DISTRICT [NO. E-1990-0040-2]

HONORABLE MICHAEL R. LANDERS, JUDGE

AFFIRMED

Appellant Nathan Eugene Kingrey appeals the order of the Union County Circuit Court that entered a $16,132 child-support arrearage judgment against him in favor of appellant's former wife, appellee Gina Lynn Perdue Massey. Appellant argues that the trial court's decision is clearly erroneous and should be reversed because: (1) appellee waived her rights to collect child support or should have been estopped from collection for the time periods in question; (2) the trial court abused its discretion in not permitting appellee's former attorney to testify as to whether he believed these arrearages were collectible; (3) appellant was under no duty to provide for medical expenses for the child and should have been given more than a $500 credit; and (4) the trial court failed to give appropriate weight to the impeachment

testimony regarding a settlement offer. After completing our de novo review, and giving due deference to the credibility determinations made by the trial court, we affirm.

The parties divorced in 1990, and appellee was awarded custody of their then-two-year-old daughter, Kerrie Lynn Kingrey. Appellant was ordered to pay $36 per week child support. Medical expenses and insurance were not mentioned in the decree. In 1991, appellee opened a file with the child support enforcement unit (hereinafter "CSEU"), seeking back-due child support that had accrued as of March 1991, an order for an increased rate of weekly child support due to an increase in appellant's income, and a command for appellant to secure health insurance for the child or pay half of medical expenses. As months went by, appellee became unsatisfied with the "hassle" and delay of her case. Therefore, appellee wrote to CSEU requesting that it close her file beginning August 26, 1992. She ended her handwritten letter by stating, "I also forgive any arrearages." The child support case was closed. On September 23, 1992, the trial court entered an order relieving CSEU as counsel, and noted that Lowery Well Service was no longer obligated to withhold child support from appellant's wages.

In February 2000, appellee again filed a petition for arrearages, for an increase in child support, and for an order concerning medical and dental insurance. This petition was filed by her privately-retained counsel. In July 2001, an agreement was reached, increasing child support to $85 per week to commence in July 2001. The trial court entered an order reflecting this agreement, but specifically reserving all other issues for further hearing. Appellant admittedly paid child support from and after July 2001 at the increased rate.

In September 2005, appellee filed a motion seeking a hearing on the arrearages accruing between August 26, 1992 and July 6, 2001. Appellant responded that appellee could not collect for that time period because she had slept on her rights, being prevented by the doctrines of estoppel, laches, waiver, accord and satisfaction, and was further barred by res judicata. The cause came to be heard in early 2006. The parties' daughter was set to graduate from high school in May 2006.

Appellant testified that he and his wife were never asked by appellee for child support between August 1992 and July 2001, that they sent birthday and Christmas gifts for his daughter, that they provided health insurance through appellant's employer and divided uncovered expenses with appellee, that appellee gave up back-due child support in exchange for not allowing appellant visitation, and that they relied to their detriment on the July 2001 order as a finalization of all issues between the parties up to that time. Appellant believed that the present hearing came about because appellee and her husband were angry that appellant did not acquire a good lumber deal for them through his employer. Appellant did not dispute the amount of child support that accrued between August 1992 and July 2001. Rather, he asserted that appellee unreasonably delayed her pursuit to his detriment.

Appellee testified quite to the contrary. She agreed that she was frustrated between 1991 and 1992, ultimately closing her CSEU case. Nonetheless, she started over when she filed anew in February 2000 to collect arrearages that had accrued between August 1992 and that date, plus any increase due and owing to her for their child. She denied ever telling

appellant that she did not expect him to pay child support any more. Appellee agreed that appellant had paid for health insurance and had divided expenses with her for those costs not covered by insurance. She also agreed that appellant sent occasional gifts for birthdays and Christmas, and he paid $500 toward an accident in which their daughter was involved. She did not dispute that he should receive a credit for that amount.

Appellant called Andrew Best, an attorney with CSEU, to testify about his understanding of the case file. He recounted the opening and closing of the file with CSEU. Appellant's attorney asked whether attorney Best believed that as of the July 2001 order, there would be an enforceable right to collect arrearages between 1992 to 2001. This drew an objection, sustained by the trial court.

At the conclusion of the hearing, the trial court took the case under advisement, issuing a letter opinion on June 5, 2006. In that letter, the judge recounted the course of events leading to the present conflict, and said in relevant part that appellant's frustration with CSEU was reasonable; that her abandoning her first attempt in 1991 to collect did not bar her from trying again for those amounts accruing between her outright disclaimer of support prior to August 1992 and what accrued thereafter; that appellant had not demonstrated that appellee should be equitably estopped; that the provision of health insurance, division of health related expenses not covered by insurance, and occasional gifts did not act as an offset of his child support duty; and that appellee was awarded a sum of $16,132 in back-due child support, after

a credit for $500. A formal order, incorporating the letter opinion, was filed of record on June 19, 2006, and a timely notice of appeal followed.

We review equity cases de novo on the record, but we do not reverse a finding of fact by the trial court unless it is clearly erroneous. *Medlin v. Weiss*, 356 Ark. 588, 158 S.W.3d 140 (2004). A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been committed. *Id*. at 592, 158 S.W.3d at 143.

Once a child-support payment falls due, it becomes vested and a debt due the payee. *Office of Child Support Enforcement v. King*, 81 Ark. App. 190, 100 S.W.3d 95 (2003). Under Arkansas Code Annotated section 9-14-234(b) (Supp.1995), enacted as part of Act 383 of 1989, any order providing for payment of child support becomes a final judgment subject to writ of garnishment or execution for any money which has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order. Furthermore, the court may not set aside, alter, or modify any decree, judgment or order which has accrued unpaid support prior to the filing of a motion to do so. Ark. Code Ann. §§ 9-14-234(c) and 9-12-314(c). These statutes were enacted in order to comply with federal regulations and to insure that the State will be eligible for federal funding. *Sullivan v. Edens*, 304 Ark. 133, 801 S.W.2d 32 (1990).

Enforcement of child-support judgments are treated the same as enforcement of other judgments, and a child-support judgment is subject to the equitable defenses that apply to all

other judgments. *Id*. The elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) she must intend that her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other's conduct to his detriment. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004); *Hendrickson v. Office of Child Support Enforcement*, 77 Ark. App. 103, 72 S.W.3d 124 (2002). Estoppel involves both, not just one, of the parties; the party claiming estoppel must prove he relied in good faith on some act or failure to act by the other party and that, in reliance on that act, he changed his position to his detriment. *Undem v. First Nat'l Bank*, 46 Ark. App. at 165, 879 S.W.2d at 454. There is no estoppel in the absence of a change of position in reasonable reliance. *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000); *Chitwood v. Chitwood*, 92 Ark. App. 129, 211 S.W.3d 547 (2005). In this context, credibility is a crucial factor. *See Chitwood*, *supra*. The standard of review for equitable estoppel, as well as waiver, is whether the trial court's decision is clearly erroneous. *Medlin*, 356 Ark. at 592, 158 S.W.3d at 143.

Waiver is the voluntary abandonment or surrender by a capable person of a right known by her to exist, with the intent that she shall forever be deprived of its benefits, and it may occur when one, with full knowledge of the material facts, does something that is inconsistent with the right or her intention to rely upon it. *Taylor v. Hamilton*, 90 Ark. App. 235, 205

S.W.3d 149 (2005). The relinquishment of the right must be intentional. *Moore v. Pulaski County Special Sch. Dist.*, 73 Ark. App. 366, 43 S.W.3d 204 (2001).

Here, the case revolved around the credibility determinations made by the trial court. Appellant contends that he relied on appellee's failure to collect child support between 1992 and 2001, that when wage-assignment was ceased by order of the court back in 1992 he thought this meant he no longer owed child support, and that he thought appellee was trading the child support during that period for him not seeing their daughter. The trial court was not convinced of his assertions, and we cannot conclude that these findings are clearly erroneous.

Appellant's contention that the trial court clearly erred in finding that appellant did not show detrimental reliance is not persuasive. Appellant points to the letter sent by appellee to CSEU that she was forgiving past due child support in August 1992. However, it was not until the litigation resumed years later that appellant became aware of the letter. Appellant was charged with knowing that appellee was dismissing her present petition for arrearages as of 1992. There was no order relieving appellant from paying child support, nor did appellant seek such an order. That appellant hoped not to have child support accrue and now owes a substantial lump-sum is not contemplated by the concept of "detrimental reliance." Appellant simply failed in his burden of proof before the trier of fact and determiner of credibility.

We hasten to add that while appellant paid child support from and after July 2001 in the increased amount, the issue of arrearages was left unresolved, and the order in July 2001 noted that the trial court was reserving other issues for a further hearing. The doctrine of res

judicata consists of "two facets, one being issue preclusion and the other claim preclusion." *Beebe v. Fountain Lake Sch. Dist.*, 365 Ark. 536 S.W.3d (2006). Claim preclusion bars the relitigation of a subsequent suit when five elements are met: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *See id.* There was no final adjudication on the arrearages that had accrued between August 1992 and July 2001. Therefore, res judicata did not apply.

Appellant next argues that the trial court abused its discretion in not permitting the attorney from CSEU to testify as to whether he believed these arrearages were collectible. Trial courts have broad discretion and that a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005). The admissibility of expert testimony rests largely within the broad discretion of the trial court, and an appellant bears the burdensome task of demonstrating that the trial court abused its discretion. *See*, *e.g.*, *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997); *see also* Ark. R. Evid. 701-706. Our supreme court takes a dim view of attorneys testifying as expert witnesses and giving their opinions, specifically so holding regarding such testimony about the issue of the excessiveness of tort damages. *See Byrd v. Dark*, 322 Ark. 640, 911 S.W.2d 572 (1995). The court in *Byrd* held that "this practice cannot be countenanced and must be discouraged . . . . That is a matter for the trier of fact to determine."

Id. at 646. *See also Williams v. First UNUM Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004). Whether the claim for arrearages was collectible was the ultimate issue to be decided by the trial court, and for us to decide on appeal. We discern no abuse of discretion in not allowing the CSEU attorney to testify as to his legal opinion on whether appellee's claim for child support arrearage was enforceable.

Appellant argues also that he was unfairly denied greater credits for amounts expended on behalf of their daughter for medical expenses, particularly where he was under no legal obligation to provide for those expenses. Appellant, in his brief, states that he paid extra expenses "as a voluntary matter." This answers the query. Appellant voluntarily paid these extra expenses, which gives him no legal basis to demand a credit. Moreover, appellant does not explain or describe exactly what amounts to which he believes himself entitled, over and above the $500 credit he received. In the absence of proof, we cannot conclude that the trial court erred.

As a final matter, appellant asserts that the trial court failed to give appropriate weight to the evidence that appellee's attorney offered to settle the arrearages for a substantially lesser amount. This, he argues, impeached appellee's testimony where she stated that she never said the back-due child support amount was $2500 as opposed to over $16,000. The trial court heard the settlement evidence, but it declined to determine appellee to be less credible in her overall testimony. Appellant argues that this constitutes reversible error. We disagree.

Arkansas Rule of Evidence 408 is not a blanket prohibition against the admission of all evidence concerning offers to compromise. *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997) (citing *McKenzie v. Tom Gibson Ford, Inc*., 295 Ark. 326, 749 S.W.2d 653 (1988)). The Rule does, however, prohibit the introduction of such evidence when the evidence is offered to prove "liability for, invalidity of, or amount of the claim or any other claim." *McKenzie*, 295 Ark. at 332-33, 749 S.W.2d at 657 (quoting Rule 408). The evidence was permitted in this case for the purpose appellant desired. Nonetheless, it did not have the desired effect of obliterating appellee's credibility. The weight and value of the evidence was for the trier of fact to determine.

In summary, we are not left with a distinct and firm impression that a mistake has been committed in this case, and we affirm.

Affirmed.

PITTMAN, C.J., and HEFFLEY, J., agree.